In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 315

DOROTEO FUENTES-TORRES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is reported at 344 F. 2d 911.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1965 (Pet. App. A8). The petition for a writ of certiorari was filed on July 1, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether this Court should reexamine its decisions holding that statutes relating to the deportation of aliens are not subject to the constitutional prohibition against *ex post facto* laws.

STATUTE INVOLVED

Section 241(a)(11) and (d) of the Immigration and Nationality Act of 1952, 66 Stat. 204, 206, 208, as amended by the Act of July 18, 1956, § 301(b), 70 Stat. 575, and by the Act of July 14, 1960, § 9, 74 Stat. 505 (8 U.S.C. 1251(a)(11) and (d)), provides in pertinent part:

> SEC. 241. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
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>
> (11) * * * at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana * * *;
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> * * * *
>
> (d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding * * * (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.
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> * * * *

STATEMENT

On April 16, 1964, following proceedings before a special inquiry officer, petitioner, a 39-year-old native and citizen of Mexico, who had last entered the United States at Del Rio, Texas, on September 13, 1944,[1] was ordered deported to Mexico on the ground that on December 27, 1957, he had been convicted in the California Superior Court in and for the County of Santa Clara for the offense of possessing marihuana[2] —a crime making him deportable (after his conviction) under Section 241(a)(11) of the Immigration and Nationality Act of 1952, as amended (Pet. App. A6-A7). On June 4, 1964, the Board of Immigration Appeals affirmed the order (Pet. App. A4-A5), and on April 8, 1965, in review proceedings brought under Section 106(a) of the Act, 8 U.S.C. 1105a(a), the

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[1] Petitioner's original entry, for permanent residence, occurred in 1939, when he was thirteen (Pet. App. A 7). The 1944 reentry, according to the petition, followed a brief visit to Mexico (Pet. 4). Petitioner is married to a citizen of the United States and has three native-born children. At the time of the special inquiry officer's decision, he had been separated from his wife for over a year and he was serving a nine-month sentence for failure to support her. He advised the special inquiry officer that he "thought" his wife was being supported by "welfare" (Pet. App. A6-A7).

[2] In violation of Section 11500 (now in pertinent part Section 11530) of the California Health and Safety Code. Petitioner was sentenced for the offense to imprisonment in the California State Prison for the term prescribed by law, of which he actually served two years (Pet. App. A6). An earlier conviction—in the United States District Court for the Southern District of California, in 1945, for forgery—resulted in his being placed on probation (Pet. App. A7).

court of appeals also affirmed (Pet. App. A1-A3, A8). The court of appeals noted that conviction of possession of marihuana was first made a cause for deportation on July 14, 1960,[3] more than three years after the commission by petitioner of the relevant offense. Observing, however, that it had been settled by repeated decisions of this Court that the *ex post facto* clause of the Constitution does not apply to deportation statutes and that the sole basis for petitioner's challenge to the deportation order was that these holdings were erroneous and should be overruled, the court sustained the order.

ARGUMENT

This Court, as petitioner acknowledges (Pet. 5), has repeatedly (and in recent years) held that the *ex post facto* clause of the Constitution has no application to deportation statutes. See, *e.g.*, *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 593-596; *Galvan* v. *Press*, 347 U.S. 522, 529-532; *Marcello* v. *Bonds*, 349 U.S. 302, 314; *Lehmann* v. *Carson*, 353 U.S. 685, 690;

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[3] Previously, Section 241(a)(11) (as amended by the Act of July 18, 1956, § 301(b), 70 Stat. 575) had made it a ground for deportation to be (or have been) convicted of violating or conspiring to violate any law or regulation relating to the illicit possession of or traffic in "narcotic drugs." The Act of July 14, 1960, § 9, 74 Stat. 505, added the words "or marihuana." See p. 2, *supra*. The 1960 amendment—as noted by the court of appeals at Pet. App. A2-A3—was in response to, and was designed to overcome the effect of, two 1959 decisions by that court, *Hoy* v. *Mendoza-Rivera*, 267 F. 2d 451, and *Hoy* v. *Rojas-Gutierrez*, 267 F. 2d 490, which had held that marihuana was not a narcotic drug within the purview of the section as it had formerly read.

Mulcahey v. *Catalanotte*, 353 U.S. 692, 694. Cf. *Carlson* v. *Landon*, 342 U.S. 524, 534. As observed in *Galvan* v. *Press*, *supra*, 347 U.S. at 531:

> Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. * * * [T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government. And whatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation.

Petitioner's sole contention is that the Court should reexamine this well-settled rule. None of the reasons suggested in the petition supports this course.

1. The fact that in *Bugajewitz* v. *Adams*, 228 U.S. 585 (one of the cases referred to in *Harisiades* v. *Shaugnessy*, *supra*, 342 U.S. at 594, as authority), the Court's observation regarding this principle was not necessary to the decision (Pet. 7-8) is plainly no warrant for such a reexamination.[4] Even less germane

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[4] The Court said in *Bugajewitz:* "The prohibition of *ex post facto* laws in Article I, § 9, has no application [to deportation statutes] [citing *Johannessen* v. *United States*, 225 U.S. 227, 242], and with regard to the petitioner it is not necessary to construe the statute as having any retrospective effect" (228 U.S. at 591). That the Court in *Harisiades* was well aware that the pertinent statement in *Bugajewitz* was *dictum* is clear. The entire statement from the earlier opinion, as quoted above, was quoted in the *Harisiades* opinion (342 U.S. at 594).

is the fact (Pet. 6, 15-16) that in *Keller* v. *United States*, 213 U.S. 138, 144, the Court remarked (in ruling on an issue not otherwise pertinent) that it was "unnecessary to determine" in that case "how far Congress may go" in legislating with respect to the conduct of a resident alien.

2. Nor does anything which was said or done by the Court in *Jordan* v. *De George*, 341 U.S. 223, furnish a reason for the *de novo* inquiry which petitioner advocates. The Court in that case (at 231-232) examined a deportation statute with a view to determining whether it gave adequate warning of the kind of conduct from which aliens who might be affected by it were required to desist. Petitioner argues that the fact that the Court thought it necessary to scrutinize the statute with that purpose in mind is inconsistent with the view that the *ex post facto* clause does not apply to deportation laws. The statute involved in the *Jordan* case, however (see 341 U.S. at 225), was basically prospective in character—it subjected to deportation those who "hereafter" were sentenced more than once to imprisonment for one year or more for a crime involving moral turpitude. The Court could reasonably have assumed, therefore, that the purpose of the enactment was partly to deter aliens from committing the kinds of misconduct defined—a characteristic purpose of a criminal statute. Moreover, the alleged vagueness of the statute affected its validity not merely because it might not have constituted fair warning but also because it might result in unequal application of the statute—a danger which is not presented by a definite retrospective provision. In the present case, Congress has made explicit its intent to

make past misconduct or a past event a cause for deportation.

3. The essential point is that, as this Court has often observed, deportation, however drastic may be its impact in a particular case on the life and family ties of an affected individual, is not and has never been considered a punishment for crime. The fundamental and characteristic purpose of a deportation law is not to punish, but, as was said in *Mahler* v. *Eby*, 264 U.S. 32, 39, "to rid the country of persons who ha[ve] shown by their career that their continued presence here would not make for the safety or welfare of society." Cf. *Bugajewitz* v. *Adams*, *supra*, 228 U.S. at 591 (per Holmes, J.): "[D]eportation [is not] a punishment; it is simply a refusal by the Government to harbor persons whom it does not want."

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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